

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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H. THOMAS CADELL, JR., *Chief Counsel*



October 3, 1994

Jeffrey A. Berman
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2121 Avenue of The Stars, Suite 2700
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Re: **Personal Attendants**

Dear Mr. Berman:

The State Labor Commissioner, Victoria Bradshaw, has asked me to respond to your letter of August 25, 1994, regarding the above-referenced subject.

In your letter you present hypothetical situations regarding the duties of two classifications of workers performing what you refer to as "personal companion" duties.

As you know, the Division does not make "rulings" involving IWC coverage. The Division will issue opinions from time to time which are designed to aid employer's and their representatives in determining their obligation under the law. However, a determination of the classification of "personal companion" is fact-intensive and must be made on a case-by-case basis.

It would not be possible for the Division to even opine on the fact situation you hypothesized. For instance, drawing a distinction between the amount of time one would be involved in "household work related to the care of the patient" (19%) and "miscellaneous light housekeeping" (6%), is, we feel, very hypothetical. We believe that we can give you our opinion on the state of the law, but not on the specific fact situations you present.

Initially, we must point out that the workers you classify as "CNA/Companions" and those classified as "Sitter/Companions" will be expected to "tak[e] the patient's temperature or pulse...[and] observe patients for general physical, emotional, and mental conditions and report any changes to their supervisors..." You state that these are tasks which "can be performed by a lay person." As the Interpretive Bulletin (86-1) states:

"It should be noted that practical nurses are explicitly

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covered by Order 15 and may not be exempted as personal attendants even though many of their duties are the same. Any worker who regularly gives medication or takes temperatures or pulse or respiratory rate, regardless of the amount of time such duties take, falls within some classification of nurse, licensed or unlicensed¹.

It would appear that these categories might fall within the classification of nurse. However, this, again, would be a fact-intensive question since you use the term "occasionally" to denote the duties of these workers with regard to what the DLSE would consider a nurse classification while the Interpretive Bulletin mentions "regularly"².

Next, your letter mentions that the "DLSE and the courts also have taken the position that, although general household work performed for the benefit of other than the patient counts against the 20% standard, household work that is related to the care of the patient (such as cooking, making beds, or washing clothes) is not to be included in determining compliance with the 20% standard." In reaching this conclusion you rely upon Interpretive Bulletin 86-1 and the case of *Cardenas v. Mission Industries*. You further state that the interpretation outlined above would also be consistent with the federal regulation on the subject found at 29 CFR § 552.6) We don't understand how you came to either of these conclusions.

You do mention, of course, that the court was relying on the language contained in a "draft" of the *Operations and Procedures Manual*. That "draft" was not adopted by the State Labor Commissioner. If the "draft" language was ambiguous that was probably the reason the language was not adopted by the Labor Commissioner. The very fact that it was a "draft" should put everyone on notice that this was not the adopted position of the DLSE.

The IWC Order defines "personal attendant" duties as follows: "to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision."

¹At fn. 1 of your letter you make mention of the fact that "CNA" means "certified nurses aide and requires a recognized state home health aide certificate obtained by completion of a certified home health aide training program, or a current state CNA license."

²We find it difficult to understand how the workers employed as CNA/Companions who must have training and a license are expected to perform duties which are related to those of a nurse less than 1% of the time while those who have no training and no certification will perform these duties 2% of the time.

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The provision then goes on to state that the status shall apply when "no significant amount of work other than the foregoing is required." Since the foregoing does not include "making beds, washing clothes, preparing meals, dishwashing, etc." it is apparent that such work is not contained within the duties of the personal attendant and must be included in the "other work."

Inasmuch as both of the scenarios you paint provide that the worker will spend more than 20% of the working time engaged in "housekeeping", it would appear that neither of the categories would meet the requirements for the exemption. However, we make no "ruling" on this but only offer the opinion of the DLSE based upon the facts you present.

I hope this addresses as adequately as possible the issues you raised in your letter of August 25, 1994.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw

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